

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>DANIEL SCOTT PETRICHKO,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>DAVID KURTZ, WARDEN, GENE</b>	:	
<b>BERDINERE, DEPUTY WARDEN, NICOLAS</b>	:	
<b>MARTYAK, M.D., and SCOTT RIZZARDI,</b>	:	
<b>CORRECTIONAL OFFICER,</b>	:	
	:	
<b>Defendants.</b>	:	<b>NO. 98-2790</b>

**MEMORANDUM - ORDER**

**AND NOW**, this 5<sup>th</sup> day of January, 1999, upon consideration of the motion of defendant Nicolas Martyak ("Martyak") to dismiss (Document No. 11), the response of pro se plaintiff Daniel Scott Petrichko ("Petrichko") (Document No. 13), the reply of Martyak (Document No. 14), the motion of Petrichko to amend the complaint (Document No. 12), the response of Martyak (Document No. 15), and the motion of defendants David Kurtz, Warden ("Kurtz"), Gene Berdinere, Deputy Warden ("Berdinere"), and Scott Rizzardi, Correctional Officer ("Rizzardi") (collectively "the institutional defendants") to dismiss (Document No. 16), and the response of Petrichko (Document No. 18), having found and concluded that:

1. Petrichko filed a complaint in this Court alleging claims under 42 U.S.C. § 1983 that the defendants violated his rights under the Eighth Amendment. Petrichko was an inmate at the Schuylkill County Prison at the time of the events alleged in his complaint. Specifically, he alleges that on July 30, 1994, another inmate pushed him into a steel pole which dislocated his shoulder. Petrichko asked Rizzardi, the guard on duty, to go to the hospital, but Rizzardi told Petrichko that there was not enough personnel to take him to

the hospital at that time. Rizzardi instructed another inmate to relocate Petrichko's shoulder. Petrichko alleges that the supervisor on duty at this time, Berdinere, refused to give him ice for the swelling. Petrichko alleges that Martyak, the prison doctor, came to the prison every Wednesday and Friday, but that he was refused medical treatment until August 15, 1997. On that date, Martyak prescribed Naporsin twice a day for a week for the pain. Martyak refused Petrichko's request for X-rays and told him that X-rays were unnecessary because his injury consisted of only stretched muscles and tendons.

Petrichko alleges that he wrote requests to the warden, Kurtz, for X-rays and to go to the hospital, but that Kurtz did not answer his requests. Petrichko was transferred to Luzerne County Prison from August 29, 1997 until September 19, 1997, where he had X-rays taken and was prescribed Naporsin for his shoulder pain. He left Luzerne County Prison before the results of the X-rays came back. When he returned to Schuylkill County Prison, he informed the nurse that X-rays had been taken and asked to see the prison doctor. He was told that the doctor was not at the prison at that time. Petrichko left for S.C.I. Camp Hill on October 2, 1997, where he saw a bone specialist and had more X-rays taken on October 29, 1997. The specialist informed him that he had a permanent injury because of the delay in his medical treatment. Petrichko alleges that all of the defendants acted with deliberate indifference in providing medical care for his shoulder injury.

2. Rule 12(b) of the Federal Rules of Civil Procedure provides that "the following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be granted." In deciding a motion to dismiss under Rule 12(b)(6), a

court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

The Federal Rules of Civil Procedure require only notice pleading. See Fed. R. Civ. P. 8(a) (providing that pleadings should contain “a short and plain statement of the claim showing that the pleader is entitled to relief”). Because Petrichko’s complaint is pro se, it must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Estelle v. Gamble, 429 U.S. 97, 106 (1976) (internal quotes omitted).

3. To state a claim under § 1983 for violation of the Eighth Amendment based on inadequate medical care, a plaintiff must demonstrate that the defendants exhibited “deliberate indifference to [his] serious medical needs.” Estelle, 429 U.S. at 104. To demonstrate deliberate indifference, a plaintiff must show that the defendants were more than merely negligent in diagnosing or treating his serious medical condition. A claim under § 1983 cannot be based solely on a prisoner’s disagreement with the medical care he received. See id. at 107 (“A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment.”); Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 302, 346 (3d. Cir. 1987). However, if prison authorities deny reasonable requests for medical treatment which subjects the inmate to undue suffering or a threat of tangible injury, or if they delay treatment for non-medical reasons, deliberate indifference may be present. See id. at 346-47.

A prison official's conduct does not constitute deliberate indifference "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must be both aware of facts from which the inference can be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). While a plaintiff must allege that the officials were subjectively aware of the requisite risk, a plaintiff may demonstrate that the prison official had knowledge of the requisite risk through circumstantial evidence, and "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Farmer, 511 U.S. at 842.

4. Martyak moves to dismiss the allegations against him on the following grounds: (1) Martyak is not the proper party as he is now deceased, (2) Petrichko only alleges that Martyak failed to X-ray his shoulder which is insufficient to state a claim under § 1983, and (3) Petrichko did not allege that Martyak knew of the substantial risk of harm to Petrichko because of his failure to order an X-ray.
5. Petrichko responds to the motion to dismiss of Martyak by arguing that (1) he was unaware of the death of Martyak and that he seeks to amend the complaint to name the representatives of the estate of Martyak,<sup>1</sup> and (2) it was not just that Martyak failed to X-ray Petrichko's shoulder but that the overall examination by Martyak was perfunctory and pro forma in that the doctor did not feel, knead, or examine his arm and shoulder, but

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<sup>1</sup> Petrichko filed a motion to amend the complaint after Martyak filed his motion to dismiss. Petrichko seeks to amend his complaint to assert his claim against the representatives of Martyak's estate, but he does not seek leave to amend his complaint to cure the other defects that Martyak raises in his motion to dismiss.

only prescribed the pain killers.

6. Petrichko does not allege any facts that would support an inference that Martyak subjectively knew that denying Petrichko X-rays would pose a substantial risk of serious harm to him. Petrichko does not argue in his response to Martyak's motion to dismiss that Martyak knew of the substantial risk of harm, but rather argues that "[i]f this respondent did not know of the possible consequences of the injured area which he was examining he had no business being a physician." (Pl.'s Response at 8). An allegation by Petrichko that Martyak should have known that he needed to have an X-ray to prevent serious harm may state a claim for negligence under state law, but it is not sufficient to support his claim for violation of his constitutional rights under § 1983. Amending his complaint to name the representatives of Martyak's estate will no cure the other defects in Petrichko's allegations against Martyak. Thus, I conclude that there is no basis on which Petrichko could amend his complaint to state a cause of action against Martyak under § 1983.
7. The institutional defendants move to dismiss the allegations against them on the grounds that: (1) any and all action taken by the institutional defendants with respect to Petrichko's medical care were reasonable and justified and Petrichko's claims are based on a difference of opinion between Petrichko and the defendants as to how he should have been treated, (2) Petrichko's allegations relating to his medical treatment do not constitute deliberate indifference, (3) Petrichko fails to set forth any relevant facts in support of these allegations, (4) the institutional defendants are immune from suit under §

1983 ,<sup>2</sup> and (5) the complaint is frivolous in that there is no factual basis for any of the claims made by Petrichko.

8. Petrichko responds to the motion of the institutional defendants by arguing that the institutional defendants are not immune, that his claims are not frivolous, and that the actions of the institutional defendants in delaying his care constitute deliberate indifference.<sup>3</sup>
9. Although Petrichko alleges that the defendants acted with deliberate indifference to his serious medical needs, I conclude that Petrichko's claims against the institutional defendants fail to state a claim upon which relief may be granted in that he failed to allege that any of the institutional defendants subjectively knew that there was a substantial risk of serious medical harm to Petrichko in refusing to take Petrichko to the hospital, refusing him medical care until two weeks after his injury, and refusing to answer his written requests for care. Because Petrichko is proceeding without the assistance of counsel and because it is possible that Petrichko may be able to cure the deficiencies in his pleading, I will grant Petrichko leave to amend his complaint as to the institutional defendants only to allege that the institutional defendants knew that there was a substantial risk of serious harm to the defendant, if the facts, the law, and Rule 11 of the Federal Rules of Civil

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<sup>2</sup> In support of their fourth argument, the institutional defendants cite Delaney v. Shobe, 235 F. Supp. 662, 666 (D. Or. 1964), for the proposition that "jailers, institutional superintendents and keepers of almost all varieties enjoy a sweeping immunity under the Civil Rights Act." However, the issue in that case was the liability of prison officials for incarcerating a prisoner pursuant to a court order; thus, the reasoning of that case is inapposite to the claims of Petrichko against the institutional defendants.

<sup>3</sup> Petrichko also argues that counsel for the institutional defendants did not enter an entry of appearance on the record and it is unclear which of the defendants the attorney is representing. However, the docket reveals that Frank Robert Cori, Esq. is counsel of record for the institutional defendants, and under Local Rule of Civil Procedure 5.1, the filing of the motion to dismiss on behalf of those defendants is deemed an entry of appearance.

Procedure will allow;

it is hereby **ORDERED** that the motion to dismiss of Martyak is **GRANTED** and the complaint as to Martyak is **DISMISSED**. The motion to dismiss of the institutional defendants is **GRANTED** and the complaint as to them is **DISMISSED WITHOUT PREJUDICE** to the right of Petrichko to file an amended complaint as to the institutional defendants only (David Kurtz, Gene Berdinere, and Scott Rizzardi) in accordance with this Order no later than **February 1, 1999**. The motion to amend of Petrichko to rename and add as a defendant the estate of Martyak is **DENIED** on the grounds asserted therein.

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**LOWELL A. REED, JR., J.**